DAMAGES FOR INJURY TO CHATTELS RECOVERABLE BY PERSON HAVING POSSESSORY INTEREST ONLY. — In early English property law possession was always of controlling importance.[1] Title, as distinguished from possession, was of little consequence. At that time, when theft of chattels was most common, a recovery depended upon raising hue and cry, and giving hot pursuit.[2] It is only natural, therefore, that in the early cases the person in possession, and he only, should sue for injury to chattels.[3] As between wrongful possessors it was thought that any other state of law would amount to an invitation to all the world to scramble for possession.[4] Influenced by these matters of history and policy the English court in the Winkfield case [5] established the doctrine of modern damage law, that a bailee may recover the whole damage done to a bailed chattel by a wrongdoer, though the bailee would not be liable to the bailor for such wrongful act. The court there said, *obiter*, that such a recovery by the bailee would bar a subsequent action by the bailor for the injury to his general property.[6] The case is law generally.[7] It has been followed recently by a Canadian court which approved the *dictum* also. *Compton* v. *Allward*, 48 Can. L. J. 109 (Manitoba, K. B.).

It is a cardinal principle of the law of damages that a cause of action should give only proper compensation.[8] A right of action, indeed, is merely a substitute given by law for some right of a plaintiff which has been violated. Under the present state of law, however, a bailee, and probably a finder or wrongful possessor,[9] is permitted to sue and recover damages for injury which he has not sustained. This, with submission, is anomalous. Moreover, it seems there is a danger of great injustice to the general owner. Suppose a bailee sues a wrongdoer and after receiving the full value of the chattel in satisfaction absconds or is insolvent. Or, suppose he settles with the wrongdoer without bringing suit. Surely it is not law that by such satisfaction of judgment or other settlement a person with a mere special property can take away any right of the general owner.[10] And yet this is what the *dicta* in the cases indicate.[11] After allowing the bailee a full recovery, the courts could hardly hold otherwise. It is only just to the wrongdoer that he should

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[1] See 3 HARV. L. REV. 23–40.

[2] See POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 169; HOLMES, THE COMMON LAW, chap. 5.

[3] The authorities prior to 1869 are collected in a note to Hostler *v.* Skull, 1 Am. Dec. 583 (N. C.).

[4] See Webb *v.* Fox, 7 T. R. 391, 397.

[5] [1902] P. 42. See 13 HARV. L. REV. 411; 15 *id.* 585.

[6] See The Winkfield, *supra*, 61.

[7] Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405; Union Pacific R. Co. *v.* Meyer, 76 Neb. 549, 107 N. W. 793. Two cases in America anticipated the holding in the Winkfield case. Woodman *v.* Nottingham, 49 N. H. 387; Brewster *v.* Warner, 136 Mass. 57.

[8] Fay *v.* Parker, 53 N. H. 342; Murphy *v.* Hobbs, 7 Colo. 541.

[9] Armory *v.* Delamirie, 1 Str. 505.

[10] These difficulties of the present law are considered in 2 BEVEN, NEGLIGENCE, 3 ed., 737, note.

[11] The cases have, with few exceptions, adopted the *dictum* of the Winkfield case, that the general owner is barred by the special owner's recovery in full. See Brinsmead *v.* Harrison, L. R. 8 C. P. 584.

not be subject to a subsequent suit by the general owner; for the wrongdoer is without a remedy against the bailee who sued him and has had satisfaction.[12]

This condition of law is no longer justifiable. The chief historical reasons underlying the old decisions have now become obsolete.[13] To-day title and the limited possessory interests are recognized as separable,[14] and capable of distinct valuation. So, if both the general owner and one having a special property have suffered damage by the wrongful act of a third party each should bring an action for his own actual loss. There can be no serious objection to a jury determining the value of the particular interest injured. This is done, constantly, in analogous cases, where limited interests in property are involved.[15] This was the view of an English court in an accurate and well-reasoned opinion.[16] It has been made the practice by statute in some American jurisdictions,[17] and recently the Massachusetts court indicated a leaning in this direction.[18] This comports with sound principles of damage law; and the only hardship on the parties would be merely such as are incident to all jury valuations.

REMOTENESS OF TRUSTS FOR ACCUMULATION DURING MINORITIES OF TENANTS IN TAIL.[1] — In determining whether provisions for accumulation by trustees during a term for years are too remote, it is submitted that three things must be considered: 1. the position of the term for years on which the trusts are raised; 2. the power to enter and accumulate; 3. the direction of the accumulated fund. If the term succeeds

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[12] Marriot *v.* Hampton, 7 T. R. 269; Hamlet *v.* Richardson, 9 Bing. 644. But *cf.* Duke de Cadaval *v.* Collins, 4 A. & E. 858.

[13] See 2 BEVEN, NEGLIGENCE, 736, note.

[14] Nicholls *v.* Bastard, 2 C. M. & R. 659; Manders *v.* Williams, 4 Exch. 339.

[15] Lienor and lienee: Fowler *v.* Gilman, 13 Met. (Mass.) 267. *Cf.* Mulliner *v.* Florence, 3 Q. B. D. 484. Pledgor and pledgee: White *v.* Allen, 133 Mass. 423; Johnson *v.* Stear, 15 C. B. N. S. 330. Mortgagor and mortgagee: Brierley *v.* Kendall, 17 Q. B. 937. Vendor and vendee: Chinery *v.* Viall, 5 H. & N. 288; Gillard *v.* Brittan, 8 M. & W. 575. Bailor and bailee: See The Winkfield, *supra*, 60.

[16] Claridge *v.* South Staffordshire Tramway Co., [1892] 1 Q. B. 422, 423, per Hawkins, J.: "It is true that if a man is in possession of a chattel and his possession is interfered with, he may maintain an action but only for the injury sustained by himself. The right to bring an action against a wrongdoer is one thing, the measure of damages recoverable in such action is another." For discussion of this case, see 6 HARV. L. REV. 156; 13 *id.* 411. It was doubted in Meux *v.* Great Eastern Ry. Co., [1895] A. C. 387, and overruled by the Winkfield case, *supra*.

[17] MICH. LAWS, 1865, 325, referred to in Weber *v.* Henry, 16 Mich. 399; Darling *v.* Tegler, 30 Mich. 54. These are cases of replevin, but this does not alter their importance as a matter of damages. *Cf.* GEORGIA CODE, 1911, tit. 9, c. 3, art. 2, § 4486; Lockhart *v.* Western & Atlantic R., 73 Ga. 472.

[18] See Bowen *v.* New York Central, etc. R. Co., 202 Mass. 263, 269, 88 N. E. 781: "The plaintiff has, as bailee, a special property . . . and so might sue in her own name for the injury to it, and at any rate, with the consent of the general owner, could recover full damages therefor." By thus qualifying the rule the Massachusetts court has removed the most objectionable feature from the law as laid down by Holmes, J., in Warner *v.* Brewster, 136 Mass. 57.

[1] This discussion excludes any consideration of the THELLUSSON ACT (39 & 40 GEO. 3, c. 98).